

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
(WESTERN DIVISION)

YESENIA CABRERA)	CASE NO. 1-01-CV-10032
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
LAKE MANAWA NISSAN,)	
d/b/a/ AUTOMART 150)	
)	
Defendant.)	

The Court has before it defendant's motion for summary judgment and motion to dismiss, filed June 3, 2002. Plaintiff filed a resistance on July 8, 2002. In its October 10, 2002 Order, the Court granted summary judgment in favor of defendant on the Credit Repair Organization Act claim; denied defendant's motion for summary judgment on the Iowa Consumer Protection Act claim; held that Nebraska law applies to the conversion claim; and withheld ruling on the Truth in Lending Act Claim (TILA). The Court now grants defendant's motion for summary judgment on the TILA claim.

I. BACKGROUND

The facts giving rise to this case are set forth in this Court's October 10, 2002 Order and are incorporated by reference. The facts are undisputed or viewed in a light most favorable to plaintiff. Additional facts relevant to the present motions will be incorporated in the body of this order.

II. APPLICABLE LAW AND DISCUSSION

The TILA was enacted "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various terms available to him and avoid the uninformed use of

credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.” 15 U.S.C. § 1601(a). The TILA and Regulation Z, promulgated to implement the TILA, require a creditor to make certain written disclosures to the consumer.¹ Regulation Z states that the disclosures are to be made “before consummation of the transaction.” 12 C.F.R. § 226.17(b); *see also* 15 U.S.C. § 1638(b)(1). Consummation is defined as “the time that a consumer becomes contractually obligated on a credit transaction.” 12 C.F.R. § 226.2(a)(13). State law governs the determination of when a contractual obligation is created for purposes of Regulation Z. *See* 12 C.F.R., Pt. 226, Supp. 1, subpt. A, § 226.2 ¶ 2(a)(13) (2001).

Plaintiff alleges that on October 14, 2000, she went to defendant’s business, completed a credit application, signed purchase documents, put down a \$500.00 deposit, and drove home with a 1998 Chevrolet Cavalier. She contends that defendant gave her a receipt for her down payment but did not provide her with any other documents. Plaintiff argues that defendant violated the TILA and Regulation Z, because she was not given the required disclosures in a form that she could keep before consummation of the transaction.

Under Nebraska law, plaintiff became contractually obligated when she signed the credit application and purchase documents; there was an offer, an acceptance of the offer, and consideration. *See Sayer v. Bowley*, 503 N.W.2d. 166, 169-70 (Neb. 1993) (setting forth the elements of contract formation). Courts in other jurisdiction are in accord. *See Spearman v. Tom Wood Pontiac GMC*

¹ To the extent applicable, the TILA requires disclosure of the following information: the identity of the creditor; the amount financed; the finance charge; the finance charge expressed as an annual percentage rate; the sum of the amount financed and the finance charge; and the due dates for repayments. *See* 15 U.S.C. § 1638(a); 12 C.F.R. § 226.18.

Inc., 2001 WL 987849, *3 (S.D. Ind. 2001) *reversed on other grounds* (holding that credit transaction was consummated once buyer signed credit contract); *Holley v. Gurnee Volkswagen & Oldsmobile, Inc.*, 2001 WL 243191, at *3 (stating that “consummation generally occurs at signing”); *Compton v. Altavista Motors, Inc.*, 121 F. Supp. 2d. 932, 936 (W.D. Va. 2000) (same). The transaction was consummated, and defendant allegedly failed to make the disclosures required by the TILA. Therefore, plaintiff has pled facts that, if proven, constitute a violation of § 1638(b)(1) of the TILA. The question remaining is whether damages are available.

Plaintiff does not seek, nor has she alleged facts that support, an award of actual damages. *See* Complaint and Jury Demand, ¶ 20. Instead, plaintiff seeks statutory damages pursuant to § 1640(a)(2), which provides in relevant part:

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under § 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of –

- (1) any actual damage sustained by such person as a result of the failure;
- (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction . . . (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$200 or greater than \$2,000; . . .

. . . In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this title a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, section 1637(a) of this title, or paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. . . . In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the “amount financed”), (3), (4), (5), (6), or (9) of section 1638(a) of this

title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title.

The Seventh Circuit analyzed this provision of the TILA in *Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (2000). There, Judge Easterbrook explained that the reference to “this part” in the first sentence of § 1640(a) is to Part B of the TILA, 15 U.S.C. §§ 1631-49. *Id.* at 990. “Statutory damages are therefore available for violations of any requirement in these 19 sections, ‘except as otherwise provided in this section.’” *Id.* (quoting § 1640(a)). The exceptions come in the two sentences that begin, “In connection with the disclosures referred to in” either § 1637 or § 1638. As to § 1638, the statute states that statutory damages are available “only for failing to comply with . . . paragraph (2) (insofar as it requires a disclosure of the ‘amount financed’), (3), (4), (5), (6), or (9) of section 1638(a) of this title,” or for failing to comply with disclosure requirements under State law. The word “only” confines statutory damages to the enumerated list. *Id.* at 992. Because § 1638(b)(1) is not on the list, plaintiff cannot recover statutory damages for violations of that provision. *Id.* See also *Ross v. Edwards-Archer Oldsmobile Cadillac, Inc.*, No. 1-01-cv-80019 (S.D. Iowa 2002) (statutory damages are available only for violations of 15 U.S.C. §§ 1638(a)(2), (3), (4), (5), (6) and (9)); *Peter v. Village Imports Company*, 2001 WL 1640130, *3 (D. Minn. 2001) (same); and *Tripp v. Charlie Falk Auto*, 2001 WL 1105132, *6 (E.D. Va) (actual damages are the only remedy available for dealership’s failure to make timely disclosures as required by § 1638(b)). *But see Carter v. Atchley Ford, Inc.*, 2002 WL 802682, *3-*4 (D. Neb. 2002) (statutory damages are available for violations of § 1638(b)); and *Lozada v. Dale Baker Oldsmobile, Inc.*, 145 F. Supp. 2d 878, 889

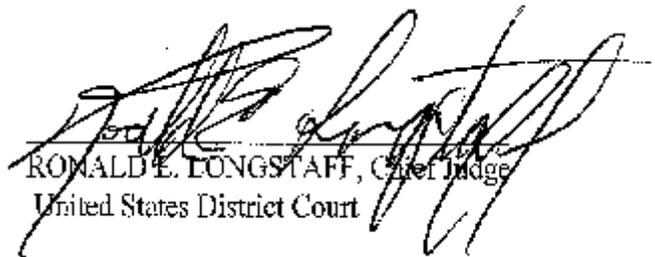
(W.D. Mich. 2001) (same).

III. CONCLUSION

Plaintiff alleged facts that, if proven, constitute a violation of § 1638(b)(1) of the TILA. However, plaintiff does not seek actual damages, and statutory damages are not available for violations of § 1638(b)(1). Therefore, defendant's motion for summary judgment on plaintiff's TILA claim is granted.

IT IS ORDERED.

This 18th day of November, 2002.



RONALD E. LONGSTAFF, Chief Judge
United States District Court